

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

WILLIE HARRIS
Gary, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BELINDA ELAINE DAVIS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

[illegible]

No. 45A03-0704-CR-154

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0409-FA-44

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Belinda Davis appeals her aggregate forty-four month sentence for Class C felony battery and Class C felony intimidation. We affirm.

Issue

The sole issue is whether the trial court erred in making a nunc pro tunc correction to its original sentencing order.

Facts

On September 12, 2004, Davis approached Margaret Davis (no relation) and her husband with a handgun as they left church. Margaret's granddaughter had recently broken off her engagement to Davis's son. Davis told Margaret she was going to kill her and her husband for allegedly interfering in the relationship. Davis then fired several shots, striking Margaret three times. Davis then told Margaret and her husband not to call the police or she would return and kill them for real.

The State charged Davis with Class A felony attempted murder, Class C felony battery, Class C felony intimidation, and Class A misdemeanor carrying a handgun without a license. On the morning of trial, December 4, 2006, Davis agreed to plead guilty to Class C felony battery and Class C felony intimidation, with the other two charges to be dismissed. The agreement also provided, "The parties agree that they are free to fully argue their respective positions as to the sentence to be imposed by the Court, however it is agreed that the sentences imposed by the Court shall run concurrently" App. p. 62.

After pleading guilty but before sentencing, Davis held a protest outside the courthouse and indicated to the press that she would seek to withdraw her guilty plea. However, after the trial court conducted a hearing on the matter, Davis decided not to withdraw her plea and she agreed to proceed to sentencing on February 26, 2007. At the conclusion of the sentencing hearing, the trial court stated, “the defendant is sentenced to forty-four months in the Indiana Department of Correction.” Sentencing Tr. p. 138. That same day, the trial court issued a written order entering judgments of conviction for Class C felony battery and Class C felony intimidation. The order also stated, “the defendant is sentenced to forty-four (44) months in the Indiana Department of Correction.” App. p. 69. The trial court also dismissed the attempted murder and handgun charges. On March 12, 2007, the trial court entered a nunc pro tunc order indicating that it was amending the February 27, 2007 order in part so that it now read, “the defendant is sentenced to forty-four (44) months in the Indiana Department of Correction **on each count, which sentences are ordered to run concurrently to each other.**” Id. at 71 (emphasis in original). Davis now appeals.

Analysis

Davis contends that the March 12, 2007 nunc pro tunc order was erroneous because it amounted to a change in her sentence, and that notice to her and her presence in court was required before such a change could occur. She relies upon Indiana Code Section 35-38-1-15, which provides:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person.

The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

The purpose of this statute “is to provide prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence.” Robinson v. State, 805 N.E.2d 783, 785 (Ind. 2004) (quoting Gaddie v. State, 566 N.E.2d 535, 537 (Ind. 1991)). A motion under the statute can only apply to sentencing errors that are clear from the face of the judgment imposing the sentence in light of statutory authority. Id. at 787.

Where a trial court enters an incorrect sentencing order that does not violate express statutory authority or is not otherwise facially illegal, Indiana Code Section 35-38-1-15 does not apply. Beliles v. State, 663 N.E.2d 1168, 1173 (Ind. Ct. App. 1996). Instead, a trial court may in some circumstances correct a clerical error in a sentencing judgment by means of a nunc pro tunc entry outside the presence of the defendant. See id. A nunc pro tunc entry is an entry made now of something that was actually done previously to have effect as of the former date. Id. at 1171. Such entries may either change or supplement an entry in the trial court’s order book and must be based upon written memoranda, notes, or other memorials that must 1) be found in the record of the case; 2) be required by law to be kept; 3) show action taken or orders or rulings made by the court; and 4) exist in the records of the court contemporaneous with or preceding the date of the action described. Id.

These rules governing the entry of nunc pro tunc orders are relaxed if the trial court merely corrects a clerical error. Id. Additionally, Indiana Trial Rule 60(A)¹ states in part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time before the trial court clerk issues its Notice of Completion of Clerk's Record. Such corrections may be made by the trial court on its own initiative

In Beliles, the defendant pled guilty to Class B felony dealing in cocaine under an agreement that provided for a twenty-year sentence, with six years suspended and fourteen years executed. However, the trial court originally entered a sentencing order and abstract of judgment stating that the sentence was twenty years, with six years executed and fourteen years suspended. About one month later, the trial court entered a nunc pro tunc corrected sentencing order, reflecting a sentence of six years suspended and fourteen years executed. However, no corrected abstract of judgment was sent to the Department of Correction, nor was the defendant notified of the correction. Shortly before the defendant was set to be released from prison after serving one-half of a six-year executed sentence, the trial court issued a corrected abstract of judgment to the Department of Correction, reflecting a term of six years suspended, fourteen years executed.

¹ Indiana Rule of Criminal Procedure 21 states that the Indiana Trial Rules apply in criminal proceedings unless they conflict with a specific criminal rule. There is no criminal rule governing correction of clerical errors in judgments, and no criminal rule states that Indiana Trial Rule 60 does not apply in criminal cases.

On appeal, we affirmed the nunc pro tunc entry of a corrected sentencing order and issuance of a corrected abstract of judgment without notice to the defendant. See Beliles, 663 N.E.2d at 1173. We held that Indiana Code Section 35-38-1-15 did not apply, and that “the record affirmatively demonstrates that Beliles was to be sentenced to an executed term of fourteen years under the terms of his plea agreement and that the original sentencing order simply contained a clerical error.” Id. at 1171. We also held that the defendant’s due process rights were not violated by the amended sentencing order and abstract of judgment because he could show no prejudice, aside from having his hopes dashed of being released from prison earlier than the plea agreement had provided. See id. at 1172-73.

Here, as in Beliles, Indiana Code Section 35-38-1-15 does not apply because Davis’s total sentence of forty-four months—or three years and eight months—in the original sentencing order did not exceed the express statutory sentencing authority for two Class C felonies, which was between two and eight years for each offense. See Ind. Code § 35-50-2-6(a). Thus, Davis’s presence in court for announcement of a corrected sentencing order was not required by statute.

As for whether this was a proper nunc pro tunc order, we believe this is simply a case where the trial court committed a clerical oversight in failing to state that the forty-four month sentence applied to both Class C felony convictions. The trial court’s clear intention was that Davis’s aggregate sentence would be forty-four months. The plea agreement required that the sentences for both offenses be served concurrently; the trial court’s correction to the sentencing order to reflect that the forty-four month sentence

applied to both convictions, to be served concurrently, merely complied with the plea agreement's terms.

We also note that there was no prejudice to Davis caused by the trial court's nunc pro tunc entry without notice or Davis's presence. Her total sentence was not changed at all by that entry. She had already been given an opportunity to argue and present evidence as to an appropriate sentence, after which the trial court announced that a total term of forty-four months was proper. We fail to perceive what Davis's in-court presence when the trial court entered the corrected sentencing order, providing for an identical term of imprisonment, would have accomplished.

Conclusion

The trial court did not err in making a nunc pro tunc entry correcting a clerical oversight in its original sentencing order. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.